Editor's note: Appealed -- aff'd, Civ. No. 77-0415-D (W.D. Okla. Dec. 8, 1978) 466 F.Supp. 521

COTTON PETROLEUM CORPORATION
v.
SAMEDAN OIL CORPORATION

IBLA 76-490 Decided February 8, 1977

Appeal from decision of Anadarko Area Director, Bureau of Indian Affairs, which approved a communitization agreement for oil and gas lease contract No. 14-20-205-6489.

Affirmed.

1. Indian Lands: Leases and Permits: Generally--Indian Lands: Leases and Permits: Oil and Gas--Indian Lands: Oil and Gas Leasing: Allotted Lands

   Where an oil and gas lease on Indian allotted lands provides for a term of years and as much longer thereafter as oil and gas is produced in paying quantities, upon failure to achieve production during the primary period the lease terminates by its own terms.

2. Indian Lands: Leases and Permits: Generally--Indian Lands: Leases and Permits: Oil and Gas

   An oil and gas lease on Indian lands will not be extended beyond the primary term by the mere assertion of the lessee, after the lease has expired, that the lease had been committed to a unitized area which contained a producing well. Where the record shows that the lessee did not comply with the terms of the lease or the regulations requiring the lease to affirmatively seek approval of the Secretary of the Interior to officially commit

the lease to a producing unit, outside events had no effect on the lease, and the lease expired by its own terms.

3. Indian Lands: Leases and Permits: Generally--Indian Lands: Leases and Permits: Oil and Gas--Cooperative Agreements

A communitization agreement involving an oil and gas lease for Cheyenne-Arapaho allotted lands may properly be approved by the Area Director, BIA, pursuant to 25 CFR 172.24 where that agreement incorporates all the terms and conditions of a State pooling order which joined the lessee with all other holders of mineral interests in the other tracts involved in the unit agreement.

APPEARANCES: G. L. Jidge Verity, Esq., Oklahoma City, Oklahoma, for appellant; G. D. Ashabranner, Esq., Ames, Dougherty, Black, Ashabranner & Rogers, Oklahoma City, Oklahoma, for appellee, Samedan Oil Corporation; Benno G. Imbrock, Esq., Field Solicitor, U.S. Department of Interior, Anadarko, Oklahoma, for appellee, Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Cotton Petroleum Corporation has appealed an action of the Anadarko Area Director, Bureau of Indian Affairs (BIA), dated May 20, 1975, in which he formally approved a communitization agreement, entered into by Samedan Oil Corporation, regarding certain Cheyenne-Arapaho allotted lands Samedan had leased.

Cotton Petroleum Corporation originally filed its appeal June 9, 1975, with the anadarko Area Director, BIA. The appeal was submitted to the Commissioner of Indian Affairs, who subsequently transmitted the case to the Board of Indian Appeals January 9, 1976, for review pursuant to revisions in the administrative appeal regulations. The case was ultimately transferred to this Board for consideration February 27, 1976, pursuant to the jurisdictional requirement of 30 CFR 290 et seq.

This appeal involves an allotment of land which was made to a member of the Cheyenne and Arapaho Tribes under the Act of March 3, 1891, 26 Stat. 989, 1022, which specifically made applicable thereto the provisions of the General Allotment Act of February 8, 1887, 24 Stat. 388. The latter enactment recited that the United States will hold the land in trust for the benefit of the allottee or his heirs and upon expiration of the trust period will convey the same to said Indian by patent in fee, free of all charge or encumbrance.

By virtue of the issuance of a trust patent the Indian allottee received the equitable or use title, however, the legal title remained in the United States.

The allotment of Without Nose, Cheyenne-Arapaho Allottee No. 1165, was made by trust patent pursuant to the above-cited enactments covering, along with other lands, the SW 1/4 SW 1/4 of Section 22, Township 12 North, Range 9 West, Indian Meridian, Oklahoma. Under the provisions of the said trust patent, the lands are held in trust for a period of 25 years. The initial trust period has been duly extended and the United States continues to hold the said SW 1/4 SW 1/4 of Section 22 in trust for the heirs of Without Nose.

Section 25 U.S.C. 396 provides:

> All lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this section into full force and effect: Provided, that if the said allottee is deceased and the heirs to or devisees of any interest in the allotment have not been determined, or, if determined, some or all of them cannot be located, the Secretary of the Interior may offer for sale leases for mining purposes to the highest responsible qualified bidder, at public auction, or on sealed bids, after notice and advertisement, upon such terms and conditions as the Secretary of the Interior may prescribe.

The record shows that Sun Oil Company originally obtained an oil and gas lease for the Cheyenne-Arapaho allotted lands of Lottie Coyote Sleeper, deceased, successor to Without Nose, deceased, Cheyenne-Arapaho Allottee No. 1165, for the SW 1/4 SW 1/4 Sec. 22, T. 12 N., R. 9 W., I.M., Canadian County, Oklahoma, Lease Contract No. 14-20-205-4895. The lease was approved by the Anadarko Area Director, October 14, 1969. The lease was specifically designated for a 5-year term in section 1 of the lease where it provided:

> * * * for the term of 5 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

> If the lessee shall commence to drill a well within the term of this lease, the lessee shall have the right to drill such well to completion with reasonable diligence and if oil or gas, or either of them, be found in paying quantities, this lease shall continue and be in force with like effect as if such well had been completed within the term of years herein first mentioned.

Since the lessee presented no evidence of oil or gas production or that drilling of a well had begun on the leased land during the life of the lease, the lease expired by its own terms October 14, 1974.

After the lease expiration the Concho Agency, BIA, included this 40-acre tract for lease as part of its December 3, 1974, lease sale of allotted lands. Thomas R. Gray, Jr., was the successful bidder for the tract and received a similar 5-year term oil and gas lease, (Contract No. 14-20-205-6489) approved January 9, 1975, by the Acting Superintendent, Concho Agency, BIA. Samedan Oil Corporation acquired this lease from Gray by a formal assignment, dated December 19, 1974, approved by the Acting Superintendent, Concho Agency, BIA, also effective January 9, 1975. 1/ There is no record of such an approved assignment from Sun Oil to Cotton

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1/ The assignment was approved pursuant to 25 CFR 172.22. This section of the regulations governing assignments and overriding royalties provides:

"(a) Leases hereafter approved, or any interest therein, may be assigned or transferred only with the approval of the Secretary of the Interior, and to procure such approval the assignee must be qualified to hold such lease under existing rules and regulations, and shall furnish a satisfactory bond for the faithful performance of the covenants and conditions thereof.

"(b) No lease or any interest therein or the use of such lease shall be assigned, sublet, or transferred, directly or indirectly, by working or drilling contract, or otherwise, without the consent of the Secretary of the Interior.

"(c) Assignments of leases and stipulations modifying the terms of existing leases shall be filed with the superintendent within 30 days after the date of execution."

Petroleum, or any documentation of exactly how or when Cotton obtained its interest in the Sun Oil lease. 2/

With respect to the history of the development of the communitization agreement in question the record indicates that initially the Corporation Commission of the State of Oklahoma on March 3, 1967, issued Order No. 65190, which purportedly created a drilling and spacing unit for all of Sec. 22, T. 12 N., R. 9 W., I.M., Canadian County, Oklahoma, for the production of gas and gas condensate from the Skinner sand formation. By Order No. 73241, of April 10, 1969, the Corporation Commission also established all of Sec. 22 as a drilling and spacing unit for the production of gas and gas condensate from the Morrow formation. Both of these orders by their terms purportedly included all the lands in the Section. The State agency made no provision for exclusion of federally leased lands or leased Indian allotted lands within the drilling and spacing units.

On June 13, 1974, during the term of Sun Oil's lease No. 14-20-205-4895, Cotton Petroleum Corporation, Texas Oil and Gas Corporation, and May Petroleum, Inc., entered an operating agreement establishing all of Section 22 as one working interest unit and designated Cotton Petroleum Corporation as operator. 3/ Thereafter, on March 5, 1975, Cotton Petroleum sought and obtained another order of the Oklahoma Corporation Commission (Order No. 111345) which pooled all outstanding interests underlying Section 22 for the production of gas and gas condensate from the Morrow

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2/ Cotton Petroleum Corporation's exact legal interest in the SW 1/4 SW 1/4 is not clear from the record. In clause 5 of the Commission's findings in Order No. 111345 it states:

"Applicant [Cotton Petroleum] further testified that they have acquired leases for the whole section except SW 1/4 SW 1/4 Section 22. In the opinion of Applicant, Sun Oil Company owns rights to the SW 1/4 SW 1/4 of Section 22, and for this reason, was the only party named in the pooling application. Applicant testified he has offered Sun Oil Company an overriding royalty interest of 1/8 of 1/8 in lieu of cash." (Emphasis added.)

3/ Exhibit A to this agreement indicated Cotton Petroleum held an interest in 360 acres of Section 22, amounting to 56.25 percent, of which 40 acres in the SW 1/4 SW 1/4 was allegedly subject to the agreement.

and Skinner common sources of supply. Cotton Petroleum was officially designated as the party permitted to drill and operate the well on the proposed unit.

Samedan Oil Corporation, as holder of the most recent oil and gas lease for the SW 1/4 SW 1/4 Sec. 22, participated in the Commission's proceedings resulting in Order No. 111345. Although Samedan was not named in the original pooling application it was acknowledged by the Commission that "a party asserting claim to lands being pooled is a party in the pooling action." 4/ In the face of Cotton Petroleum's continuing objections Samedan appeared at the Corporation Commission's hearing and stated that it had no objection to Cotton being named operator of the well, or other holdings of the Commission. The Corporation Commission, over Cotton's objections, ruled that Samedan was a proper party to the action and that the Commission's order applied to all parties. The outstanding interest owners were allowed 5 days from the date of the order to either elect to participate in the unit well or to elect to receive a cash bonus. Samedan filed a timely election to participate in the unit well, dated March 6, 1975, and, therefore, was effectively pooled by the Commission's order.

On the basis of the two State orders which originally established drilling and spacing units for Section 22 and the State Order No. 111345 granting Samedan the right to participate in the pooling action for the section, Samedan submitted its communitization agreement to the BIA January 3, 1975, for approval in compliance with the regulations and the terms of the assigned lease. The Area Director, Anadarko Area Office, BIA, approved the agreement May 20, 1975.

Cotton Petroleum Corporation on appeal objects to the BIA approval of the communitization agreement of May 20, 1975, contending that it is the owner of the oil and gas leasehold estate underlying the SW 1/4 SW 1/4 Section 22, T. 12 N., R. 9 W., I.M., Canadian County, Oklahoma, rather than Samedan Oil Corporation. Appellant contends in effect that it is the record owner of Sun Oil Corporation's lease No. 14-20-205-4895, dated September 18, 1969; that [it] "by virtue of Oklahoma Corporation Commission Order No. 111345 did obtain all right, title and interest of Sun Oil Company subject to an overriding royalty interest held by Sun Oil Company."

4/ The Commission recognized the title dispute to the SW 1/4 SW 1/4 in finding 8 of the order and that it would leave the determination to the district court. Samedan filed suit in the Federal District Court for the Western District of Oklahoma against Cotton Petroleum, Sun Oil Co., et al., civ. 85-0434 D, May 27, 1975, to determine title to the oil and gas rights for the tract in question. That suit is currently pending the outcome of this decision.

Appellant argues that prior to the expiration of the primary term of Sun's lease, October 14, 1974, "a gas well was commenced [by Cotton Petroleum] in the NW 1/4 of Section 22, Township 12 North, Range 9 West, I.M., Canadian County, Oklahoma, said well being within the drilling and spacing unit created by said Oklahoma Corporation Commission Order Numbers 73241 and 65190; and that the commencement of operation upon said well in the NW 1/4 of said section 22 prior to the expiration of the primary term of the lease granted to Sun Oil Company had the effect of extending said lease beyond its primary term; that said well was drilled with diligence and without hesitation and completed in the Skinner formation."

As a result of these circumstances appellant claims that the lease granted to Samedan was junior and inferior to the original lease granted to Sun Oil and subsequently acquired by appellant.

The BIA through the Field Solicitor has responded contending that appellant's production from a well in the NW 1/4 of Section 22 did not extend the Sun lease because the parties did not secure formal approval of an agreement by the Anadarko Area Director prior to expiration of the Sun lease.

[1] From our review of the record we must conclude that the Sun Oil lease was not extended by production and did in fact expire by its own terms October 14, 1974. It is well established that where an oil and gas lease for Indian allotted lands provides for a term of years and as much longer thereafter as oil and gas is produced in paying quantities, upon failure to achieve production during the primary period the lease terminates by its own terms. Administrative Appeal of Continental Oil Company, 2 IBLA 116, 117 (1973), 80 I.D. 786, 787, and cases cited therein.

The Sun lease specifically provided in section 1 for a 5-year primary term (October 14, 1969 - October 14, 1974) and the lease could only be extended if oil and/or gas was produced in paying quantities from the leased land during that 5-year period, or if drilling had started prior to the end of the term and continued to production.

[2] Appellant readily admits that no well was commenced and no production was accomplished within the SW 1/4 SW 1/4 Section 22. Instead, it relies on a producing gas well which it drilled in the NW 1/4 of Section 22, and the alleged unitization of the section based on the cited Oklahoma State Commission drilling and spacing orders. However, for such circumstances to have been considered qualified production within the meaning of the terms of the Sun lease and the regulations, Sun Oil Company or its approved assignee would have first had to comply with the mandatory requirements of

the lease and the governing regulations. The fact that it clearly failed to meet these requirements is fatal to its contentions on appeal and controls the disposition of this case.

As we have seen, the statute providing for the issuance of leases on allotted Indian lands authorizes the Secretary to issue necessary rules and regulations, 25 U.S.C. § 396(d). Two pertinent sections of the Sun lease are of overriding immediate concern in this matter:

Section 3(g) provides that the lessee agrees:

> (g) Regulations--To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases including 30 CFR 221: Provided, That no regulations hereafter approved shall effect a change in rate of royalty or annual rental herein specified without the written consent of the parties to this lease.

Section 11, dealing with unit operation, provides:

> * * * The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision. (Emphasis added.)

The governing regulation in 25 CFR 172.24 dealing with lease operation and development also provides:

> (b) * * * In the exercise of his judgment the Secretary may take into consideration among other things the Federal laws, State laws or regulations by competent Federal or State authorities or lawful agreements among operators regulating either drilling or production or both, and also any regulatory action desired by tribal authorities.
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> (c) All leases issued pursuant to the regulations in this part shall be subject to a cooperative or unit development plan affecting the leased lands if and when required by the Secretary of the Interior.

For Sun Oil or its assignee to take advantage of the producing well in the NW 1/4 of Section 22, thereby claiming production through unitization of the section, it must have first given some notice of these developments to the BIA prior to the expiration of the lease. The record is devoid of anything that indicates either Sun or its alleged successor gave the BIA notice of these events or affirmatively sought an extension of the lease prior to October 14, 1974. 5/ Although appellant did execute an operating agreement for Section 22 dated June 13, 1974, Sun Oil was not a party to that agreement, nor was the agreement properly submitted to the BIA for its consideration and approval.

By the terms of the lease and the cited regulations the lessee had agreed to commit the lease to unit development only "if and when" approved by the Secretary of the Interior.

Sun Oil or its successor was obligated to seek and obtain approval for such unit development from the Secretary of the Interior or his representative, the Anadarko Area Director, BIA. Without such timely notice and required approval, the actions of the lessee, the operator, and the Oklahoma Corporation Commission are of no consequence to the Sun lease. In similar circumstances the Board of Indian Appeals has recently emphasized that "only the approval by the Area Director during the primary term of the lease could officially commit the acreage into the producing unit and thus continue the lease in full force and effect." Administrative Appeal of Continental Oil Company, supra, 2 IBLA at 118, 80 I.D. at 788. Therefore, appellant as alleged successor to Sun Oil can now derive no benefit from its well in the NW 1/4 Section 22 in order to claim extension of the

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5/ Samedan's Answer on Appeal, item #3, indicates that Appellant may have sought approval of communitization of the Sun lease in November of 1974. Samedan states:

"Samedan is informed and believes and therefore states that on a date in November, 1974 after the expiration of the primary term of the Sun lease, Cotton Petroleum Corporation submitted a proposed communitization agreement to the U.S.G.S. at Tulsa, Oklahoma, purporting to include the Sun lease in a unit consisting of Section 22, Township 12 North, Range 9 West, Canadian County, Oklahoma. On information and belief said agreement was signed only by Cotton. The U.S.G.S. refused to approve said agreement for the reason that the Sun lease had expired on October 19, 1974, and informed Cotton that there had been advertised for sale at the December 3, 1974 sale an oil and gas lease on the SW 1/4 SW 1/4 formerly covered by the Sun Lease."

Sun lease. Appellant has no proper standing as a lessee based on its interest from the original Sun lease. At best, it acquired an interest in an expired lease.

Appellant has devoted much of its brief on appeal to the consideration of whether or not the State Corporation Commission of Oklahoma has the authority and the jurisdiction to regulate Indian lands within the State and the consequences of one view or the other. Appellant argues that the Corporation Commission orders are either totally void for all purposes or totally effective for all purposes as applied to restrictive Indian lands. However, this line of argument ignores the specific statutes under which these Indian lands are administered.

To begin with as we have earlier indicated herein, the restricted Cheyenne-Arapaho allotted lands are held in trust by the United States for the benefit of the allottees for a certain trust period. Upon the expiration of the trust period or its extension as in this case, the United States will convey the legal title by a patent in fee to the Indian allottees. 25 U.S.C. § 349 (1970) specifically provides in pertinent part:

> * * * Unit the issuance of fee simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States. (Emphasis added.)

The Secretary of the Interior has also been entrusted with the exclusive responsibility of administering the oil and gas leasing on Indian lands by the Act of March 3, 1909, as amended, 25 U.S.C. § 396, which provides in pertinent part:

> All lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this section into full force and effect: * * *.

The Secretary has promulgated specific regulations governing the administration of Indian lands in 25 CFR 172, as previously

set forth herein, and in 25 CFR 1.4(a) and (b). 6/ These regulations enable the Secretary, while leasing Indian lands, to exercise his judgment in determining the applicability of various state laws, regulations or regulatory action to the Indian lands.

Furthermore, we have previously considered the effect of various spacing orders of the Oklahoma Corporation Commission and drilling agreements involving federal oil and gas leases issued under Section 17 of the Mineral Leasing Act, 30 U.S.C. § 226 (1970), in Kirpatrick Oil and Gas Company, 15 IBLA 216 (1974). In that case, we emphasized under that Act that the Federal Government is under no obligation to accede to spacing orders issued under the state's police powers for conservation purposes. We ruled that the Department has the final authority to approve communitization agreements affecting federal leases and that the State spacing orders were merely factors to be considered in determining the acceptability of these agreements. See also Texas Oil and Gas Corp. v. Phillips Petroleum Co., 277 F. Supp. 366, 369 (D. Okla. 1967), aff'd 406 F.2d 1303 (10th Cir. 1969), cert. denied, 396 U.S. 829 (1969).

The impact of these holdings is that the Secretary's consent is necessary before these spacing orders are applicable to federal lands. The same is true for the Oklahoma Corporation Commission orders affecting restrictive Indian lands. We have seen that the Congress has acted to retain the exclusive jurisdiction over

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6/ Pertinent sections of these regulations provide:

"§ 1.4 State and local regulation of the use of Indian property.

"(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

"(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property * * *."

Cheyenne-Arapaho lands in the United States under 25 U.S.C. § 349 and § 396. Such legislative action preempted the state's ability to regulate these lands unless or until the Secretary of the Interior deemed such state regulation in the best interests of the Indian allottees.

Appellant argues that the regulations do not permit the Secretary of the Interior to designate different time frames during which he will permit restricted Indian lands to be governed by state laws, rules and regulations. Appellant contends the Secretary or his representative may not get in or get out of state regulation but rather must make a one time election when to be bound by state law.

These contentions fail for the reason that the Secretary's representative in fact did only consider the applicability of the state orders once, i.e., when these orders were properly and timely submitted for his consideration with the communitization agreement. Until that juncture the question of the validity or invalidity of the orders had not been presented for the Secretary's determination by either appellant or his predecessor. Therefore, these arguments are not pertinent. For reasons already discussed herein, these orders were not binding on the lands in question until the designated representative of the Secretary approved the agreement which incorporated the orders within its provisions.

We note that as late as May 1975 when appellant first challenged the Samedan communitization, neither it nor Sun Oil had made any effort to pursue their remedy of administrative appeal, offered under 25 CFR Part 2, to challenge the expiration of the lease. It is evident that either appellant or its predecessor was aware of the BIA position as early as the expiration of the Sun lease and later when the new lease was granted to Tom R. Gray, Jr., but they delayed raising the issue through a timely appeal before the agreement in question was proposed.

Although we have held herein that appellant holds no valid current interest in the SW 1/4 SW 1/4 of Section 22, we still are faced with the question of the validity of the communitization agreement. Appellant has challenged that agreement on the basis that the agreement has not been approved by or submitted to appellant or any other owner of oil or gas in Section 22. Appellant emphasizes, inter alia, that it has not been given notice or the opportunity to participate in this agreement; that it is adversely affected by the agreement and obligated to duties and responsibilities as the operator of its well to Samedan.

[3] We do not agree with appellant's contention. A valid binding agreement exists for the other oil and gas interest owners for Section 22 and it has also properly been submitted and

approved as to the allotted Indian lands in the SW 1/4 SW 1/4. The basis for a valid agreement was effectively established by the Oklahoma Corporation Commission's pooling order No. 111345. The provisions of that order taken with the effect of earlier Commission orders No. 65190 and No. 73241 have created a Morrow and Springer unit out of Section 22 for the production of gas and gas condensate as to the lands in the section.

The purpose of the Commission's pooling order is to force all private mineral interest owners in the section into a pooling arrangement. The exact terms and conditions of the agreement are clearly and succinctly spelled out in the order. Cotton Petroleum as the initiating party to the pooling order and the designated operator of the well cannot now disassociate itself from the terms and effect of the order.

All parties participating in the Oklahoma Corporation Commission proceedings thereby indicated their agreement to abide by the Commissioner's ruling. Samedan, as a participant in the Commission proceedings expressed its willingness to join the pool and when later offered that opportunity, it voluntarily complied with the requirements of the order. Therefore, that working arrangement set up by the Commission's order also became effective as to the Indian lands when the Secretary granted approval through the BIA Area Director as required by 25 CFR 172.24(c).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge